SUPREME COURT, U.S.
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No. 82-975

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES; and EDWARD D. LONGLEY, as Director of the Bureau of Street Maintenance For the City of Los Angeles,
Appellants,

vs.

TAXPAYERS FOR VINCENT, an unincorporated political association; and CANDIDATES' OUTDOOR GRAPHIC SERVICE (COGS), a California corporation,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

APPELLEES' MOTION TO AFFIRM

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STATEMENT OF THE CASE

Appellees adopt the Statement of the Case set forth in the Jurisdictional Statement, with one material exception. Section 28.04 of the Los Angeles Municipal Code, as interpreted and enforced by Los Angeles law enforcement authorities, constitutes an absolute ban on the posting of political signs on public property. All signs are prohibited, regardless of size, construction, or content. The signs are barred from public property of any nature, including public property situated in commercial and industrial zones.

While banning temporary political signs Los Angeles permits other types of signs, both permanent and temporary, to be placed on public property, including newsrack signs, special political banners, commercial signs on bus shelters, and certain plaques identifying historical, cultural, or artistic events, locations or personalities.

ISSUES PRESENTED

The issues presented by this appeal are:

1. Whether § 28.04 is unconstitutional as an overbroad restriction on First Amendment rights;

2. Whether the defendants' enforcement of the absolute ban against temporary political signs under § 28.04, while permitting other types of signs to be posted on public property, constitutes a violation of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

The signs posted by the appellees are constructed of card stock and looped over the cross-arms of utility poles. They are not attached to or in proximity of any line transmitting electrical power. The signs are not glued, stapled, or nailed

to any part of utility poles; they are out of the reach of passersby; they present no traffic hazards; and they can be easily removed without damage to the property immediately upon conclusion of the elections to which they relate.

Appellees do not contend that they are entitled to paint, mark, or write on any public property. Nor do they claim a right to post signs on sidewalk surfaces, crosswalk surfaces, trees, curbstones, fire hydrants, traffic signals or any other similar equipment or fixtures. The appellees do not wish to post signs on public libraries, courtrooms, landscaped highways, or nature preserves, or in any other aesthetically sensitive location.

ARGUMENT

I

THE QUESTIONS PRESENTED ARE NOT RIPE FOR REVIEW.

The Ninth Circuit based its decision on First Amendment principles laid down by this Court in earlier decisions:

1. The free speech guarantee provided by the Constitution " 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.' *Monitor Patriot Co. v. Roy* (401) U.S. 265-272, 91 S.Ct. 621-625, 28 L.Ed.2d 35, 41 (1971)." (Appendix A, p. 5a).

2. The issue of whether a particular form of expression can be banned turns on " 'whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.' [*Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972)]." (*Id.*, p. 6a.)

3. The governing body has the burden of proving by a preponderance of the evidence that (a) the ordinance is reasonably related to a compelling state interest and (b) that the interest cannot be protected by a means less drastic than an absolute ban. (*Hague v. C.I.O.*, 307 U.S. 496 (1939). (*Id.*, p. 11a.)

The Ninth Circuit examined the record and concluded that while the interests sought to be advanced by the city were substantial, as an *evidentiary matter* Los Angeles had simply failed to prove that those interests could not be protected by more narrowly drafted legislation.

The Ninth Circuit suggested specific alternatives that Los Angeles might employ to achieve its goals while protecting the First Amendment rights of its citizens, such as regulating the size, design and construction of the posters, requiring their removal at the conclusion of the election, and prohibiting signs that interfere with hydrants, traffic signs, and signals or that block motorists' lines of sight. (*Id.*, pp. 11a, 12a).[1] The Court invited Los Angeles to seek judicial review at a later date if these less drastic means proved unsuccessful. (*Id.*, p. 13a).

Rejecting the Ninth Circuit's guidance, Los Angeles has prematurely appealed to this Court without first testing the suggested alternative measures or, indeed, offering any

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[1]Other alternatives exist. Los Angeles could arguably allow political signs while banning commercial signs and thus reduce the "tens of thousands" of signs it asserts (but did not prove) were posted on public property to the relatively nominal number of political signs posted in the course of public debate. Similarly, it could limit the number of signs for each candidate or ballot issue that can be posted at each location. *Baldwin v. Redwood City, infra*, pp. 1368, 1369, 1372, 1374, and 1375.

explanation as to why it finds those measures unsatisfactory. The issues that Los Angeles seeks to have this Court decide should be deferred until the appellants can present a more substantial evidentiary record to support their presently unsubstantiated apprehension that a more narrowly-drawn ordinance is unworkable.

II

THE DECISION UNDER REVIEW IS CONSISTENT WITH METROMEDIA, INC. V. CITY OF SAN DIEGO.

Los Angeles perceives an inconsistency between the Ninth Circuit decision and this Court's ruling in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). No conflict exists.

In *Metromedia*, the ordinance under review acted to (1) allow billboards advertising goods or services available on the property where the signs were located (2) ban signs on buildings or other property advertising goods or services produced or offered elsewhere and (3) prohibit all noncommercial advertising unless exempt under specific exceptions, such as that for temporary political signs.

The Court found the ordinance unconstitutional as an overbroad restriction on First Amendment rights.

Los Angeles suggests that the Ninth Circuit erred in adopting what it characterizes as the "standard" advanced by Justice Brennan in his concurring opinion when he observed that "San Diego has failed to demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an

unattractive environment." *Metromedia, Inc. v. San Diego, supra*, p. 531.

Los Angeles confuses the scale with the weight. Justice Brennan did not advance a novel constitutional standard; he simply observed that the city's contention that its ordinance was justified to protect aesthetic concerns carried little weight in the absence of evidence that the ordinance was part of a broader regulatory scheme encompassing other types of equally offensive billboards.

This point conflicts with nothing contained in the opinion of the plurality. On the contrary, Justices White, Stewart, Marshall and Powell also considered it important that the city had failed to offer up evidence in support of its discriminatory regulation:

> "The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city." *Metromedia, supra*, p. 513.

The plurality in *Metromedia* ruled the ordinance unconstitutional because it effectively banned noncommercial speech where commercial speech was permitted. *Metromedia, supra*, p. 521. Justices Brennan and Blackmun were of the opinion that the ordinance was unconstitutional because it constituted an absolute ban on a particular form of expression. *Metromedia, supra*, p. 522. The Los Angeles ordinance is unconstitutional under either analysis, as it discriminates against political speech in favor of commercial advertising and constitutes an absolute ban against temporary political signs on public property.

III

THE DECISION BELOW IS IN HARMONY WITH THE FEDERAL CASE LAW RELATING TO TEMPORARY POLITICAL SIGNS.

Los Angeles does not contend that the Ninth Circuit decision below conflicts with any case decided by another circuit. The reported cases that have considered political sign regulation have universally confirmed that small temporary signs and posters represent a uniquely inexpensive and effective means of conveying political ideas and are to be protected from overreaching municipal regulations. *Verrilli v. Concord*, 548 F.2d 262 (9th Cir. 1977); *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *cert. den. sub nom, Leipzig v. Baldwin*, 431 U.S. 913 (1977) *Aoni v. Pai*, 516 F.2d 892 (9th Cir. 1975); *Orazio v. Town of North Hempstead*, 426 F.Supp. 1144 (E.D.N.Y. 1977; and *Ross v. Goshi*, 351 F.Supp. (D.Ha. 1972).

The Court of Appeals decision is also consistent with the long line of cases striking down over-broad regulation of other forms of speech traditionally conducted on public property. See, for example, *Schneider v. State*, 308 U.S. 147 (1937) (distribution of handbills); *CIO v. Haig*, 307 U.S. 496 (1939) (picketing); and *Kovacs v. Cooper*, 336 U.S. 77 (1949) (sound trucks).[2] See, also, those recent California decisions where other Los Angeles ordinances banning other forms of speech on public property have been held

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[2]The Ninth Circuit's reliance on these cases to outlaw an absolute ban against political campaign posters on public property was foretold in two perceptive articles. See Stone, "Fora Americana: Speech in Public Places," *The Supreme Court Review* (1974) and "Right of Physical Access," *Law of Politics*, California Continuing Education of the Bar (1977).

unconstitutional. *Welton v. City of Los Angeles* (1976) 18 Cal.3d 497 (booklets sold on public streets) and *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294 (newsracks on public sidewalks).

Los Angeles and Amicus Curiae City of Antioch[3] urge a plenary review of the Court of Appeals decision on the ground that it conflicts with an intermediate State Court decision, *Sussli v. City of San Mateo* (1981) 120 Cal.App.3d 1, *cert. den.* 454 U.S. 1085 (1981) and a ruling by a district court in *Frumer v. Cheltenham Township,* 545 F.Supp. 1292 (E.D.Pa. 1982).

Both *Sussli* and *Frumer* were decided prior to the publication of the Ninth Circuit decision and would presumably have deferred to it had they been decided subsequently. It should be noted that the *Sussli* decision was split, Judge Racanelli issuing a strongly-worded dissent. The *Frumer* decision was written in denial of the plaintiff's motion for a preliminary injunction and is presently on appeal. (Third Circuit, No. 82-1598) Neither *Sussli* nor *Frumer* should be considered to represent a serious division in the law concerning the regulation of political signs.

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[3]The City of Antioch also appeared as Amicus Curiae in *Sussli v. City of San Mateo,* discussed in this Part. It is significant that the prevailing party in that case, City of San Mateo, does not join with Antioch here, having presumably reconciled its ordinance with the prevailing decision of the Ninth Circuit.

CONCLUSION

For the reasons stated above, Appellees respectfully request that their motion to affirm the judgment of the Ninth Circuit be granted and that they be awarded costs incurred on appeal, including reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.

Dated: January 4, 1983

CANTERBURY, RAUB & GREENTHAL

By WAYNE S. CANTERBURY
TAXPAYERS FOR VINCENT and
CANDIDATES' OUTDOOR GRAPHIC
SERVICE (COGS)
Appellees

STATEMENT IN COMPLIANCE WITH RULE 28

Appellee Candidates' Outdoor Graphic Service . . . COGS is not affiliated with any parent or subsidiary company or any other entity.

Dated: January 4, 1983.

WAYNE S. CANTERBURY, ESQ.